DOCUMENT RESUME

ED 449 092 SO 032 467

TITLE	Judicial Independence: An International Comparison Service. A Lesson Plan for High School Law-Related Educators To Support "Understanding the Federal Courts."
INSTITUTION	Administrative Office of the United States Courts, Washington, DC.
PUB DATE	2000-00-00
NOTE	10p.; For related documents on federal courts, see SO 032 462-468.
AVAILABLE FROM	Administrative Office of the United States Courts, 1 Columbus Circle, NE, Washington, DC 20544. For full text: http://www.uscourts.gov/outreach/index.html.
PUB TYPE	Guides - Classroom - Teacher (052)
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	Citizenship Education; *Civil Liberties; Comparative Analysis; *Court Litigation; *Court Role; Federal Courts; Foreign Countries; High Schools; *Judges; *Law Related Education; Social Studies; United States Government (Course)
IDENTIFIERS	China; *Constitutions; France; Hong Kong; India; National Social Studies Standards; *United States Constitution

ABSTRACT

It is widely believed that the judiciary can maintain the rule of law and guarantee fundamental rights only if it is independent from political and other pressures. Most countries have provisions in their constitutions guaranteeing an independent judiciary. Usually, this independence has two faces: institutional measures that separate the judiciary as an autonomous governmental structure, and provisions that regulate certain procedures that may influence judges' individual decisions. With this lesson plan students examine excerpts from constitutions of several countries (the United States, France, China and Hong Kong, and India) to determine what measures each prescribes for judicial independence. The lesson plan provides an overview, educational objectives, links to social studies standards, materials needed, handouts, and step-by-step classroom procedures. Includes a comparison chart and case study questions and answers. (BT)

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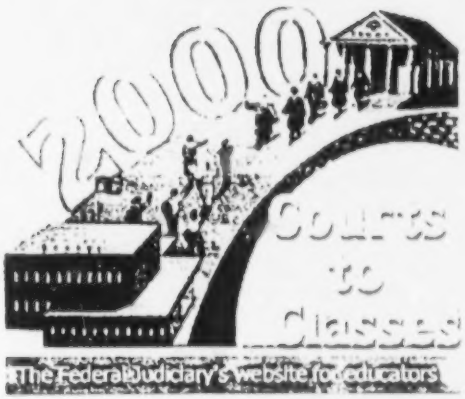

Judicial Independence: An International Comparison Service

A Lesson Plan for High School Law-Related Educators to support "Understanding the Federal Courts"

SO 032 467

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Judicial Independence: An International Comparison

Content Areas: U.S. Government, Comparative Government, Law

Grades: 11-12

Time
90 minutes

Overview

It is widely believed that the Judiciary can maintain the rule of law and guarantee fundamental rights only if it is independent from political and other pressures. Most countries have provisions in their constitutions guaranteeing an independent Judiciary. Usually, this independence has two facets: institutional measures that separate the Judiciary as an autonomous governmental structure, and provisions that regulate certain procedures — judges' pay, for instance — that may influence judges' individual decisions. This lesson has students examine excerpts from constitutions of several countries to determine what measures each prescribes for judicial independence.

Objectives

Students will be able to:

- Examine primary documents to determine the provisions for an independent Judiciary
- Compare and evaluate the provisions made by each country for an independent Judiciary
- Analyze a recent case where judicial independence was violated in Hong Kong
- Brainstorm what other conditions, besides constitutional provisions, may be necessary to ensure an independent Judiciary.

Link to National Council for the Social Studies Standards

Power, Authority, and Governance

Social studies programs should include experiences that provide for the study of how people create and change structures of power, authority, and governance.

Materials

Student Handout 1: Excerpts on Judicial Independence from the Constitutions of Four Countries

Student Handout 2: A Comparison Chart

Student Handout 3: Case Study of Judicial Independence in China and Hong Kong

Procedure

1. Focus

Ask students the following focus question:

What does it mean for you to be independent from your parents?

Categorize students' responses on the board according to the columns here. Titles of the columns should be apparent only to you at this point. Use follow-up questions to encourage a variety and clarity in

student answers. Some possible answers:

Aspects of physical independence	Aspects of intellectual independence
❑ being able to stay out later at night	❑ being able to determine what courses to take in school
❑ being able to drive the family car	❑ adopting beliefs that differ from parents

2. Transition and Input

When the two columns have several answers from students, explain that independence takes many forms, but often involves both a physical separation and an intellectual autonomy, much as they identified in their comments. Inform students that governments often seek the same kinds of independence for the various functions they must perform, particularly for the Judiciary, which must uphold the rule of law and fundamental rights even when there is enormous political and social pressure to do otherwise.

Explain to students that they will examine excerpts from constitutions of several countries to determine how they strive for judicial independence.

3. Input and Activity

Distribute Student Handout 1: Excerpts on Judicial Independence from Constitutions of Four Countries and Student Handout 2: Comparison Chart. Review the instructions with the students. You may divide students into pairs to complete the activity. Completing the first excerpt with the students may also help them complete the exercise more quickly, depending on their skill level.

When students have completed the activity, go over it with them asking several pairs or individual students to share their responses. Pay particular attention to their explanations so they can see why certain provisions promote judicial independence.

4. Transition

Ask the students this question:

Given the information you have on these constitutions, which of these countries do you believe protects judicial independence the best? Why?

Students may answer that China and Hong Kong, or perhaps India, protect judicial independence the best since their constitutions contain so many constitutional provisions to that effect. Inform students that constitutional guarantees are not always indicators of respect for judicial independence and rule of law. Explain that they will be analyzing a case dealing with judicial independence in China and Hong Kong to see how these provisions may or may not be enforced.

5. Input and Activity

Distribute Student Handout 3: Case Study of Judicial Independence in China and Hong Kong. Have a student read the case aloud. Check for understanding by having one or several students summarize the controversy in the case.

6. Checking for Understanding

Follow up with the focus questions included in the student handout. You may have the pairs of students develop the arguments for the Hong Kong Court of Appeal and the Chinese government before discussing them as a whole class. Some possible answers to the questions appear below.

7. Closure

It is particularly important to guide the discussion of the last question. It touches on other conditions in society and the political system necessary to maintain judicial independence. This has great relevance to concerns about judicial independence in the United States as well. If there is not time for a full discussion

of these issues in class, have students complete the questions for homework and discuss them during the following class period.

Answers to Case Study Questions

1. Article 126 of the Chinese constitution and Articles 19 and 85 of the Hong Kong Basic Law.
2. The Basic Law gives children the right to reside in Hong Kong if at least one parent has that right. This is fairly unambiguous and seems in accord with common notions about the right of parents to be with their children. In addition, the interpretation of the Court of Final Appeal is supposed to be final. The Chinese government in Beijing should not interfere with the rule of law as established by the courts.
3. The Chinese government and the government in Hong Kong are worried about mass migration into Hong Kong. If the Court of Final Appeal decision holds, then the city of Hong Kong, which is already overcrowded, may face an economic and social crisis. Hong Kong is a Special Administrative Region (SAR) that can exercise judicial discretion up to a point, but which should always be subject to Chinese authority especially in matters that directly concern Chinese mainland citizens.
4. In the short-term, those who wish to immigrate to Hong Kong and who, according to the Basic Law have that right, may not be able to do so. This could mean that they cannot join their families, and some may be denied better social services and economic opportunities.
5. In the long-term, the decision by the Chinese government may undermine the rule of law. If decisions of the highest court in Hong Kong can be overruled by the Chinese authorities, there is no guarantee that other fundamental rights, such as that to property, will be preserved in the future.
6. The Chinese government was able to overrule it because of its enormous unchecked power. The Basic Law in Hong Kong was supposed to protect the integrity of the political and legal systems there, but this action has shown that the Basic Law can be undermined by the government in China. Other conditions that may be necessary for a more independent Judiciary include a system of checks and balances that is put into practice by all branches of government on a regular basis, respect by politicians and society for the rule of law and fundamental rights of citizens, procedures available to citizens to protest and stop actions of its government, free press, and active and powerful interest groups.

Possible Modifications for a Shorter Period

The case study can be used on its own, if teachers provide excerpts from the Chinese and Hong Kong constitutions for students to study. Also, the comparison of countries could be reduced or even used on its own.

Resources

- *Understanding the Federal Courts* (1999), a publication of the Administrative Office of the U.S. Courts, Washington, D.C. (can be downloaded from the web site below).
- http://www.uscourts.gov/ official web site of the U.S. courts.
- Principles of Judicial Independence and Accountability Discussed at USC Conference — a brief summary of basic principles of judicial independence and its importance (http://www.snedws.com/library/judicialprinciples.htm)
- http://www.uni-wuerzburg.de/law/ - a web site that allows users to compare constitutions on various issues by using an index that cross references constitutions.
- Federalist Nos. 78 & 79 by Alexander Hamilton

Student Handout 1

Excerpts on Judicial Independence from the Constitutions of Four Countries

United States

Article III [Judiciary]

Section 1 [Judicial Power] The judicial Power of the United States, shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

France

Article 62 [Voidability by Control]

(1) A provision declared unconstitutional may not be promulgated or implemented.

(2) The decisions of the Constitutional Council shall not be subject to appeal to any jurisdiction. They shall be binding on the governmental authorities and on all administrative and jurisdictional authorities.

Article 64 [Independence]

(1) The President of the Republic shall be the guarantor of the independence of the Judiciary.

(2) ...

(3) ...

(4) Judges may not be removed from office.

China & Hong Kong (one country, two systems)

China

Article 126 [Independence] The people's courts shall, in accordance with the law exercise judicial power independently and are not subject to interference by administrative organs, public organizations, or individuals.

Hong Kong

Article 19(1) The Hong Kong Special Administrative Region (HKSAR) shall be vested with independent judicial power, including that of final adjudication.

Article 85 The courts of the HKSAR shall exercise judicial power independently, free from any interference. Members of the Judiciary shall be immune from legal action in the performance of their judicial functions.

Article 88 Judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

Article 89(1) A judge of a court of the HKSAR may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges. (2) The Chief Justice of the Court of Final Appeal of the HKSAR may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.

India

Article 124 Establishment and Constitution of Supreme Court

(2) Every Judge of the Supreme Court shall be appointed by the President ... and shall hold office until he attains the age of sixty-five years. (4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

Article 125 Salaries, etc., of Judges (1) There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule. (2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule: Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Article 137 Review of judgments or orders by the Supreme Court Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

Read through the excerpts from the four countries' constitutions above. In the chart below, list the constitutional provisions used by each country to help maintain the independence of the Judiciary. In the second column, briefly explain how each provision would help maintain judicial independence.

Country	Provisions for Judicial Independence	Explanation for How Each Provision Supports Judicial Independence
United States		
France		
China & Hong Kong		
India		

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TEACHER ANSWERS

Read through the excerpts from the four countries' constitutions above. In the chart below, list the constitutional provisions used by each country to help maintain the independence of the Judiciary. In the second column, explain how each provision would help maintain judicial independence.

Country	Provisions for Judicial Independence	Explanation for How Each Provision Supports Judicial Independence
United States	Separate judicial branch Life term for judges during good behavior Salary cannot be reduced during term in office	Having a separate judicial branch ensures that there is a body to check the power of the executive and legislative branches. Life terms ensure that judges will not be impeached for political reasons by other members of government. Salaries cannot be reduced, which means that there can be no financial threat to a judge for his / her decisions.
France	Laws declared unconstitutional cannot be enacted. Decisions of the Constitutional Council cannot be appealed. The president guarantees judicial independence. Judges may not be removed from office.	The courts have final say and cannot be overruled by other branches of government. The president has a role in helping to maintain judicial independence. Judges cannot be threatened with removal for political reasons.
China & Hong Kong	China — Administrative organs, public organizations, and individuals are not allowed to interfere with courts. HK — HKSAR has independent judicial power. Members of Judiciary are immune from legal action related to their judicial functions. Judges are appointed by Chief Executive on recommendation of independent commission. Judge can only be removed for incompetence or misbehavior. Chief Justice of Court of Final Appeal can only be investigated for incompetence or misbehavior.	Courts are given independent judicial power and it is stated clearly that other organs cannot interfere with the Judiciary. This is the clearest declaration of judicial independence in any of the constitutions. Judges are immune from legal action and may only be removed for misbehavior or incompetence.
India	Judges are appointed by president and may serve until 65. Judges may only be removed for incompetence or misbehavior. Privileges (pension, leave of absence, etc.) of a judge cannot be reduced after appointment. Judicial review of courts.	Judges guaranteed their job until they reach age of retirement. They can only be removed for incompetence or misbehavior. This makes it difficult for any group or individual to pressure a judge by threatening his / her job. In addition, the privileges of a judge are guaranteed during his / her term making it difficult to threaten the decisions of a judge. Finally, the courts have judicial review over Parliamentary acts.

Student Handout 3
Case Study of Judicial Independence in China and Hong Kong

In 1997, China regained governance of Hong Kong, which previously had been a British colony with a British system of law. Many who lived and did business in Hong Kong were fearful of the transition because Hong Kong is considerably more prosperous than China. Some believed that China would not respect the rule of law, which could damage the confidence people had in Hong Kong's legal, political, and economic systems. However, China promised to maintain "one country, two systems." In other words, Hong Kong would be considered a part of China, but would keep its former legal and economic infrastructure, complete with an independent Judiciary that would be empowered to settle all legal disputes.

Hong Kong's Basic Law, the equivalent of the U.S. Constitution, gives children the right to live in Hong Kong if they have a parent who is entitled to live in Hong Kong. This constitutional provision, however, could be interpreted to allow many mainland Chinese residents to move to Hong Kong where the standard of living is higher. So, soon after Hong Kong came under Chinese authority, the National People's Congress in mainland China declared that mainland-born children of Hong Kong parents must get a permit from Chinese authorities before entering Hong Kong. Permits would be issued in limited quantities so that thousands of mainland Chinese who qualify for Hong Kong residency under the Basic Law would not be permitted to go to Hong Kong.

In early 1999, however, the Court of Final Appeal struck down the permit law, ruling that the children of permanent residents, even those born before their parents moved to Hong Kong, had the right to immigrate. It is widely acknowledged by legal experts that this ruling was consistent with the Basic Law. However, Hong Kong's executive Tung Chee-hwa, who is appointed by the central government in Beijing, asked China to intervene and overrule the decision. He and other government officials believed that the ruling would lead to mass migration to Hong Kong, which could strain the island's social services and economy.

In June of 1999, the Standing Committee of the National People's Congress in Beijing said that the Hong Kong court had made a mistake. It declared that the Basic Law intended to give the right of residency only to children whose parents were already Hong Kong residents when the children are born. This interpretation would keep the majority of new immigrants out of Hong Kong. The Chinese government's decision generally is regarded as an interference in the independence of Hong Kong courts.

Questions to consider:

1. Which provisions in Hong Kong's Basic Law about judicial independence appear to have been violated by the Chinese government? Refer to your handout.
2. What are the arguments in favor of the Court of Final Appeal decision in this case?
3. What are the arguments in favor of the Chinese government's decision in this case?
4. What are the short-term consequences of the Chinese government's decision for those who wish to immigrate to Hong Kong?
5. What might be the long-term consequences for Hong Kong of the Chinese government's decision?
6. If Hong Kong has such extensive provisions in its Basic Law regarding judicial independence, why was the government in China able to overrule it? What other conditions may be necessary in politics and society to ensure judicial independence?